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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

Steven J. Bandusky,
Petitioner

vs.

The State of Arizona,
Respondent

Petition for a Writ of Certiorari
to the
Supreme Court of the State of Arizona

Petition for a Writ of Certiorari

Steven J. Bandusky *Petitioner, Propria Persona*
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65 pp

Questions Presented

1. Can the State of Arizona ignore the Constitution of the United States, Federal Law and its own Rules of Court by denying the petitioner the right to a speedy trial?

2. Can the State of Arizona ignore its own law in finding that a necessity defense was not justified in this case?

3. Can the State of Arizona ignore the fact that criminal intent must be proven in a finding of guilt in a criminal case?

4. Can the State of Arizona ignore its own law pertaining to the definition of an offense being "not petty" and thus wrongly deny the petitioner's right to a jury trial?

5. Since the State of Arizona legislatively involves a non-violent crime with domestic violence and since that involvement results in a penalty that is severe enough to cause the loss of custody of a parent's children, can the State of Arizona deny the right of a trial by jury?

6. Since the State of Arizona legislatively involves a non-violent crime with domestic violence and since domestic violence is a crime of moral turpitude, can the State of Arizona deny the right of a trial by jury?

7. Is the State of Arizona implementing unlawful and unconstitutional Bills of Attainder by legislatively "involving" penalties intended for violent offenses with penalties for non-violent offenses?

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Opinions

The Maricopa County Superior Court (Case No. LC 2000-002169) reviewed this case on appeal and affirmed the decision of the East Mesa Justice Court (Case No. CR00-1448MI) May 16, 2001. The Honorable Frank T. Galati addressed the issues in summary fashion as follows:

1. " Defendant's Rule 8 right to a speedy trial was not violated because he was tried within the time limits of Rule 8.2(a)."
2. " Defendant waived his right to counsel and his subsequent attempt to have the court appoint counsel for him was not supported by any credible evidence of his indigency. In order to have counsel appointed at public expense, it is the burden to prove that he is indigent. Defendant failed to do so, therefore, there was no error committed."
3. " The trial court properly ruled that the condition of the premises was not relevant to any of the issues properly before the court. The "defense of necessity" was not applicable to this case, either legally or factually."
4. "Defendant appears to challenge the sufficiency of the evidence of the requisite culpable mental state. For 13-2810, that culpable state is "knowingly." The evidence is more than sufficient."
5. " Applying the three prong test of Benitez v. Dunevant , 198 Ariz. 90, 7P. 3d. 99 (2000), the trial court did not abuse its discretion in denying defendant's request for a jury trial. Interfering with judicial proceedings is not a crime of moral turpitude and is a misdemeanor."
6. " The terms and conditions of probation imposed are all legally permissible and well within the sound discretion of the sentencing court."

The Arizona Court of Appeals- Division 1 (Case No. 1 CA-CR 01-0500) dismissed the appeal from the Maricopa County Superior Court on June 4, 2001, citing that the appellant did not challenge the validity of any issue in Superior Court within the Court of Appeals Jurisdiction. Thus, no opinion was rendered in this case by the Arizona Court of Appeals. A timely Notice of Appeal to Arizona Supreme Court was filed with the AZ Court of Appeals on June 14, 2001. In addition, it should be stated that the Court of Appeals failed to transmit the appellant's original memorandum of appeal to the Arizona Supreme Court.

The Supreme Court of Arizona (Case No. CR-01-0235-PR), denied review of this case and denied a final motion for reconsideration on September 20, 2001. Thus, no opinion was rendered in this case by the AZ State Supreme Court. A timely notice of appeal to the United States Supreme Court was filed with the AZ Supreme Court on October 1, 2001.

Statement of Jurisdiction

The Arizona Supreme Court, the petitioner's last court of resort within Arizona, refused the petitioner's motion for a final review and reconsideration of this case on September 20, 2001. A timely notice of appeal was filed with and received by the Arizona Supreme Court on October 1, 2001.

The United States Supreme Court has jurisdiction in this matter due to the fact that the decisions of the Arizona courts and Arizona law in this case are in conflict with the Constitution of the United States, in conflict with relevant decisions of the United States Supreme Court and in conflict with Federal law.

It must also be stated, the arguments brought before this court are not ones simply pertaining to domestic relations. This case most importantly deals with the constitutionality of Arizona statutes (ARS 13-3601) that involve violent offenses with non-violent offenses.

The petitioner , hereby cites that 18 USC Sec. 2403 (b) may apply. The Arizona Attorney General has been properly served pursuant to US Supreme court Rule 29.4(c).

Constitutional & Statutory Provisions

Per the United States Constitution

Article I Section 9 - in part provides

"No bill of attainder or ex post facto Law shall be passed."

Article III Section 2 - in part provides:

"The trial of all crimes, except in cases of impeachment, shall be by jury;..."

Amendment VI - in part provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation..."

Amendment XIV - Section 1 provides:

Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitutional & Statutory Provisions - cont'd

Per the Arizona State Constitution

Article 2 Section 11 - in part provides:

"Justice in all cases shall be administered openly, and without unnecessary delay."

Article 2 Section 23 - in part provides:

"The right of trial by jury shall remain inviolate. … In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law."

Article 2 Section 24 - in part provides:

"In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, … to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed."

Article 2 Section 25 - in part provides:

"No bill of attainder, ex-post-facto law, or law impairing the obligation of a contract, shall ever be enacted."

Constitutional & Statutory Provisions - cont'd

Per the United States Uniform Code

8 USC § 1227(a)(2)(E)(i) & (ii) - Deportable Aliens

(a) Classes of deportable aliens
(2) Criminal offenses
(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and
(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable.

8 U.S.C. § 1227(a)(2)(A)(i)– Deportable Aliens

(a) Classes of deportable aliens
(2) Criminal offenses
(A) General crimes
(i) Crimes of moral turpitude Any alien who -

"is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) "

18 U.S.C. § 3161(c)(1)– Speedy Trial

In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

Constitutional & Statutory Provisions - cont'd

Per the Arizona Revised Statutes

ARS 13-105 (27) - Petty offense

"Petty offense" means an offense for which a sentence of a fine only is authorized by law.

ARS 22-320 (A) - Jury Trial.

A trial by jury shall be had if demanded by either the state or defendant. Unless the demand is made at least five days before commencement of the trial, a trial by jury shall be deemed waived.

ARS 13-417 (A) - Necessity defense

Conduct that would otherwise constitute an offense is justified if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person's own conduct.

ARS 13-2810 - Interfering with judicial proceedings;

A. A person commits interfering with judicial proceedings if such person knowingly:
1. Engages in disorderly, disrespectful or insolent behavior during the session of a court which directly tends to interrupt its proceedings or impairs the respect due to its authority; or
2. Disobeys or resists the lawful order, process or other mandate of a court; or
B. Interfering with judicial proceedings is a class 1 misdemeanor.

ARS 13-2908 (A) - Criminal nuisance

A person commits criminal nuisance:

2. If, by conduct either unlawful in itself or unreasonable under the circumstances, such person recklessly creates or maintains a condition which endangers the safety or health of others.

ARS 13-3602 (J) - Order of Protection / Inherent Latitude

J. The order shall include the following statement:
Warning. This is an official court order. If you disobey this order, you may be arrested and prosecuted for the crime of interfering with judicial proceedings and any other crime you may have committed in disobeying this order.

Statement of the Case

At the heart and forefront of this case, although not specifically part of it, is the unconstitutional method that domestic relation's orders of protection are issued in an ex-parte fashion in Arizona and many other states. The fact that an United States citizen can be removed from his own domicile without an arrest warrant or due process, under the guise of protectionism, without proof or evidence of any crime, is a condition that stretches the very thread of the Constitution. This is being stated because the order of protection is the prepuce for all other items in this case.

An order of protection was issued under false accusations of domestic violence against the petitioner on January 31, 2000. The petitioner attempted to have the order quashed, but on advice from petitioner's then counsel, the order was only modified. The protective order was modified basically for 2 reasons. The first was to allow the petitioner time to see his children on Sunday afternoon and the second was to allow the petitioner time on other afternoons to finish a landscaping project that was left in a state that endangered the petitioner's children. It is significant to note that the landscaping project was started prior to the issuance of the original order of protection and that Arizona Criminal law prohibits a person from creating or maintaining a condition, which endangers the safety or health of others.

The petitioner was present at the marital residence with permission from his ex wife on Saturday morning, April 22, 2000 to pour concrete footers to be used for subsequent construction of a front yard perimeter wall. The petitioner was at the residence on this day with the only intention of curing the dangerous situation that existed and in no way had any contact with his ex wife.

The petitioner, while still finding it unbelievable to this day that he was in violation of a court order, was arrested by Mesa, Arizona City police on Saturday morning, April 22, 2000, for the criminal offense of "interfering with judicial proceedings", a class 1 misdemeanor, punishable by up to 6 months in prison, a $2500 fine and other unconstitutional legislatively involved penalties.

This case would not seem significant by itself if the singular offense of "interfering with judicial proceedings" was prosecuted, as it should have been, solely as a non-violent crime. However, the Arizona State legislature has statutorily involved the non-violent offense of "interfering with judicial proceedings", with the more serious crime of domestic violence. The Arizona legislature has allowed the courts to involve the penalties intended for a violent crime with a non-violent crime. Due to this involvement, the penalties involved with the criminal offense of "interfering with judicial proceedings" take on a serious new meaning.

The petitioner, realizing that he could be branded as a perpetrator of domestic violence, even though never being guilty of the same, timely motioned to have his case heard by a jury of his peers. This motion was originally granted by the East Mesa Justice Court magistrate, but then denied upon objection of the Maricopa county prosecutor.

The petitioner, after repeating his demand for a jury trial, was found guilty as charged for the offense at a bench trial and sentenced to a monetary fine of $314.00, 100 hours of community service and ordered to participate in domestic violence counseling. The inclusion of domestic violence counseling, for an individual that is not guilty of any violent crime, stretches one's logic.

The petitioner subsequently filed a timely notice of appeal to the Maricopa county superior court which later affirmed the decision of the justice court. The petitioner then filed a notice of appeal to the Arizona Court of Appeals, which denied review for jurisdictional reasons. The petitioner then filed a notice of appeal to the Arizona Supreme Court, which denied review. The petitioner then filed a timely notice of appeal to the United States Supreme Court, which was received by the Arizona Supreme Court on October 1, 2001.

The petitioner will argue for a writ of certiorari on five different issues. The five issues of concern are: 1) the right to a speedy trial, 2) the defense of necessity, 3) the absence of criminal intent, 4) the denial of a jury trial and 5) the prohibition of bills of attainder.

Reasons for Granting the Writ

The Courts of the State of Arizona have denied important Constitutional rights of an accused citizen that are guaranteed by the Constitution of the United States. The Arizona Courts have also adjudicated this case in a manner that is in conflict with the Constitution of the United States and in conflict with relevant decisions of the United States Supreme Court.

1. The petitioner was denied his right to a speedy trial as outlined by Amendment VI to the United States Constitution and by 18 U.S.C. § 3161. The Courts of the State of Arizona have also ignored its own rules of criminal procedure with regard to the time limits imposed for a speedy trial.
2. The petitioner was denied any admission of evidence in support of the defense of necessity. The defense of necessity was definitely relevant to this case and should have been given much deference.
3. The petitioner had no belief that he was in violation a court order and absolutely had no criminal intent, specific or general, in violating the order of protection. Thus, the petitioner should not have been charged with or found guilty of a criminal offense.
4. The petitioner was denied his right to a trial by jury as outlined by Article III Section 2 and by Amendment VI of the United States Constitution. In addition, due to the involvement of domestic violence with the original offense of interfering with judicial proceedings, the offense now becomes one that results in severe penalties and also an offense that is viewed as one of moral turpitude.
5. The petitioner has been unconstitutionally penalized by unlawful bills of attainder which are prohibited by Article I Section 9 of the United States Constitution.

Argument 1 - The Right to a Speedy Trial

The original arrest date of the petitioner was April 22, 2000. The date of the petitioner's initial appearance before a magistrate on the complaint was on April 23, 2000. The date of the arraignment was on May 24, 2000. The date of the issuance of the criminal complaint and summons was June 29, 2000. The bench trial date, set by the lower East Mesa Justice Court, was on the November 9, 2000. There were no delays caused by the petitioner. The time delay from complaint to trial was over 120 days. The time delay from arraignment to trial was over 150 days. The time delay from arrest to trial was over 180 days.

These delays are in violation of the Constitution of the United States, Federal law and Arizona's own rules of criminal procedure.

Amendment VI of the United States Constitution provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,..." The right to speedy trial was not enjoyed by the petitioner.

Pursuant to the Speedy Trial Act (See 18 U.S.C. § 3161(c)(1)), a defendant must be tried within seventy days from the filing of his indictment or information, or from the date on which he first appears before a judge or magistrate, whichever occurs later. The date from the criminal complaint to the date of the trial exceeded the70 day limit.

In addition, in Barker v. Wingo, 407 U.S. 514 (1972), the petitioner passes the following four factor balancing test outlined by the high court. First, the length of the delay is in excess of federal and state standards. Secondly, the reason for the delay was due to the state and not the petitioner. Thirdly, due to the delay, the petitioner timely motioned to have the case against him dismissed. And lastly , the petitioner was definitely prejudiced due to the continued increase of anxiety caused by the delay.

Pursuant to Arizona Rules of Criminal Procedure 8.2(a) concerning all defendants: "Every person against whom an indictment, information or complaint is filed shall be tried by the court having jurisdiction of the offense within 150 days of the arrest or service of summons under Rule 3.1 except for those excluded periods set forth in Rule 8.4 below". The date from the arrest to the trial exceeded the 150-day limit. There are no applicable excluded periods pursuant to Rule 8.4 that justify an exception.

In addition, pursuant to Arizona Rules of Criminal Procedure 8.2(c) concerning defendants released from custody: "Every person released under Rule 7 (Release rules) shall be tried by the court having jurisdiction of the offense within 120 days from the date of the person's initial appearance before a magistrate on the complaint, indictment or information, or within 90 days from the date of the person's arraignment before the trial court, whichever is the greater". The date from the initial appearance to the trial exceeded the 120-day limit.

The petitioner, on September 20, 2000, motioned the lower justice court to dismiss the prosecution based upon the denial of the defendant's right to a speedy trial. The lower court denied the motion without cause. The Petitioner further motioned the lower court on the October 2, 2000 to appeal the lower court's decision concerning the denial of the previous motion to the Superior Court. This motion was also denied without cause and a requested finding of facts or a conclusion of law.

It is important to note again that no continuances or delays were caused by a result of the petitioner's actions pursuant to Rule 8.4 prior to the trial date of November 9, 2000 which was set by the lower court. The only delay allowed under these same rules of Court is if any delay was necessitated by congestion of the trial calendar due to extraordinary circumstances. The trial judge, must promptly apply to the Chief Justice of the Arizona Supreme Court for suspension of any of the Rules of Criminal Procedure. The original trial judge did not apply for a suspension of the Arizona Rules of Criminal Procedure.

Argument 2: Defense of Necessity

As stated earlier in the statement of the case of this petition, the petitioner had started a landscaping project in the front yard of the marital residence that was left in a very dangerous state prior to the Jan 31, 2000 issuance of the order of protection.

The front yard of the marital property was left in a hazardous state that included 16-inch deep trenches adjacent to the sidewalk and vertical reinforcement steel in preparation for a perimeter front yard wall. This created the possibility of pedestrians injuring themselves by stepping off the sidewalk, (especially at night since the street was not lit) and into the trenches causing bodily harm. In addition, the petitioner's children or the general public could have fallen on the reinforcement steel and impaled themselves, resulting in serious injury or death. The petitioner suffered from a great deal of duress, due to his concern for the safety of his children. The petitioner believes that no other reasonable choice could have been made by the defendant other than that of curing this hazardous situation.

Arizona law supports the petitioner's defense of necessity. ARS 13-417. (Necessity defense). "Conduct that would otherwise constitute an offense is justified if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person's own conduct". It should be noted again that the petitioner was not allowed by the court to pursue a defense of necessity.

In addition, in United States v. Bailey , 444 U.S. 394 (1980), the US Supreme Court stated: "...we must examine both the mental element, or mens rea, required for conviction... and the circumstances under which the "evil-doing hand" can avoid liability under that section because coercive conditions or necessity negates a conclusion of guilt even though the necessary mens rea was present. "

The petitioner acted only because of the coercive conditions that existed. The petitioner acted only to cure the dangerous situation and in the best interest of his children. The petitioner was not in contact with his ex wife, nor desired to be.

In addition, the petitioner desired to avoid being prosecuted for the Arizona offense of criminal nuisance. ARS 13-2908, prohibits a person to maintain a condition that endangers others. It was the intent of the petitioner to avoid criminal nuisance and to eliminate the condition that was a danger to others. The Petitioner was attempting to be reasonable and lawful by removing the dangerous situation that existed in the front yard of the marital residence, where the children lived.

The petitioner furthermore states the following concerning the defense of necessity:

1. The petitioner reasonably believed the commission of the act was necessary to avoid or minimize a harm to his children or to others.
2. The harm sought to be avoided was much greater than the harm resulting from a violation of any law.
3. The threatening harm was brought about by the petitioner, but at a time prior to the issuance of the order of protection.
4. There was no alternative for the petitioner to pursue due to the fact that the petitioner could not afford to hire any one in his stead to cure the dangerous situation. The same financial reason applies to why the petitioner started the landscaping project by himself.

The petitioner timely motioned the lower justice court, prior to the trial on October 10, 2000 to dismiss the charges against him based upon the necessity to cure the dangerous situation that existed at his children's residence. The motion for dismissal prior to the trial was denied, but even more grievous on the lower court's part was at the time of the trial, the refusal of the lower court to even allow the petitioner to enter evidence supporting the defense of necessity.

In addition to the lower court denying the petitioner the entry of any evidence (photographs of the landscaping project) supporting the necessity defense, is the question of that of the arresting officer testifying that he had no latitude, per his police department's no tolerance policy, in making an arrest for an apparent violation of an order of protection.

However, pursuant to Arizona law, latitude is implied Pursuant to ARS 13-3602; "Order of protection; procedure; contents; arrest for violation; penalty; protection order from another jurisdiction." "Warning. This is an official court order. If you disobey this order, you may be arrested and prosecuted for the crime of interfering with judicial proceedings and any other crime you may have committed in disobeying this order".

Thus, it is apparent that the Mesa police department policy is contrary to the inherent latitude that ARS 13-3602 (J) intended when the state legislature included "may be arrested" as opposed to "shall be arrested", as the legislature specifically states in many other statutes.

The arresting officer at the bench trial attested to the fact that the petitioner was working in the front yard and that he was not in contact in any way with the alleged victim. Since discretion is definitely allowed via Arizona state statutes, a reasonable person would argue that latitude should have been applied in this situation and an arrest should not have been made.

The intent of an order of protection is to provide protection for an alleged victim. If the accused is clearly not in violation of the intent of the order and there are clearly extenuating circumstances, then there should be latitude given with regard to an arrest, especially an arrest in a criminal matter.

If there ever was a case where latitude should have been given, this case is clearly it. The apparent "no tolerance" policies of police departments regarding orders of protection have removed any possibility of a police officer using common sense. The domestic violence laws in Arizona, and many states are being implemented without any regard to reasonableness.

Argument 3: Absence of Criminal Intent

In any criminal proceeding, the prosecution must prove to the fact finder beyond a reasonable doubt that the defendant has performed a criminal act and also that the action preformed was committed with criminal intent. Clearly, due to the attempt by the petitioner to cure the dangerous situation that existed at the marital residence, the petitioner did not intend to violate the order of protection and thus did not have any criminal intent in this case.

In Morissette v. United States, 342 U.S. 246 (1952), the high court opined that: "It is fundamental that a person is not criminally responsible unless criminal intent accompanies the wrongful act." (stating that a crime is the "concurrence of an evil-meaning mind with an evil-doing hand").

There has been much ambiguity involved in the definition of criminal intent. Various courts have subdivided the definition of criminal intent into either specific or general types of intent.

In United States v. Bailey , 444 U.S. 394 (1980) the high court stated:

> "Sometimes `general intent' is used in the same way as `criminal intent' to mean the general notion of mens rea, while `specific intent' is taken to mean the mental state required for a particular crime. Or, `general intent' may be used to encompass all forms of the mental state requirement, while `specific intent' is limited to the one mental state of intent."

The petitioner ascertains that he had neither specific nor general intent with regard to violating an existing court order, but that his only intention was to cure the dangerous landscaping situation that existed in the front yard of the marital residence. It is nonsensical to believe that the petitioner had criminal intent when he was trying to cure a dangerous situation and protect his children and the general public. The alleged victim even agreed with this assertion by later signing a letter on September 26, 2000, stating

that after further consideration the petitioner was at the residence in the best interest of the community and not to harm the alleged victim. This letter, which is included in the lower court record, was not allowed to be entered into evidence on the Petitioner's behalf. The Petitioner further asserts that he did not believe he would be arrested for trying to cure the dangerous situation, else he certainly would not have been at the residence.

Once again the petitioner reiterates his disbelief that he could be arrested for trying to cure a dangerous condition at the marital residence where his children's lived or that he was in violation of the intent of the order of protection. The petitioner was at the property with the permission of the alleged victim, (even though she recanted her story at the time of the trial), to simply work in the front yard. The alleged victim had on previous occasions allowed the Petitioner to work on the project without incident. It is puzzling why this particular time the alleged victim would call 911, (in which said phone call she admitted to there being no emergency), to have the Petitioner arrested for attempting to cure a hazardous situation. The only possible answer to this question is that it was sheer vindictiveness on the part of the alleged victim, since it certainly had nothing to do with her safety.

Argument 4: Denial of Jury Trial

The petitioner timely motioned for a jury trial on September 22, 2000. The demand for a jury trial was initially granted by the East Mesa Justice Court, but subsequently denied on objection of the prosecution. The petitioner is entitled to a trial by jury as outlined by Article III Section 2 and by Amendment VI of the United States Constitution. In addition, the petitioner is entitled to his right to a trial by jury as outlined by Article 2 Section 23 and by Article 2 Section 24 of the Arizona State Constitution.

The Supreme Court of the United States and of the State of Arizona have made a citizen's constitutional right to a jury trial dependant upon the fact as to whether the crime is "petty" or not. However, in the State of Arizona, the state legislature has unambiguously defined an offense as being petty, or not. Pursuant to ARS 13-105 (27), "Petty offense" means an offense for which a sentence of a fine only is authorized by law."

The offense of interfering with judicial proceedings (ARS 13-2810), of which this petition is concerned is a class 1 misdemeanor, punishable under ARS 13-707 & 13-802 by a maximum of 6 months imprisonment and a $2500 fine. Since the penalty of the offense under ARS 13-707 has a possibility of 6 months imprisonment, pursuant to ARS 13-105 (27), it is not deemed "petty". Therefore, per Arizona law, the offense automatically qualifies for jury eligibility.

The State of Arizona has argued previously in this case that there is no right to a trial by jury because the prosecution was not seeking jail time. This supposition is flawed due to the fact that it is not the prosecutor that administers sentence, but the judge who can impose the maximum jail sentence allowed by law.

The Arizona Supreme Court opined in Strohson (945 P.2d 1251) concerning ARS 13-105 (27) that "Although the statutory definition was not controlling with respect to the right to a jury trial, we concluded it was entitled to considerable deference."

The petitioner is at a loss with this hypothesis since Arizona law clearly defines what constitutes a petty offense or not. If the offense is not petty, then the same offense qualifies for jury eligibility. The petitioner believes that the Arizona Supreme Court's decision in Strohson should be overturned based upon the existence of a state statute that clearly defines an offense as being not petty.

Aside from the Arizona statutory determination of a crime being not petty, there are other qualifying considerations regarding the right to a jury trial. The Arizona legislative involvement of domestic violence with the non-violent crime of interfering with judicial proceedings adds other severe penalties to the original non-violent offense. In addition, because of the involvement of domestic violence, the original offense is now viewed by the federal courts (and society) as one of moral turpitude.

As an overview to the judicial limitations placed upon the right to a jury trial, the petitioner cites the Arizona cases of Benitez v. Dunevant , 198 Ariz. 90, (2000), Rothweiler v. Superior Court , 410 P2d 479 (1966) and Dean v. Dolny, 778 P.2d 1193, (1989). These cases best gives a summary of the restrictive qualifications required for jury eligibility. The restrictions are basically three-fold: 1) Severity of the legislative penalty, 2) Moral quality of the offense and 3) Offenses based on Common Law. Only one of the criterion need be met in order to qualify for jury eligibility.

In accordance with these qualifying limitations, the petitioner argues that due to the involvement of the violent crime of domestic violence by the Arizona State legislature with the original non-violent offense of interfering with judicial proceedings, the offense now becomes one that results in severe penalties. In addition, the original offense becomes one involving moral turpitude. The petitioner will make no argument relevant to the basis of common law, since no similar offense existed then. In regard to the severity of the penalty, the petitioner refers to the United States Supreme Court. Referring to Blanton v. North Las Vegas, 489 U.S. 538 (1989) regarding the right to a jury trial

> "The most relevant criterion for determining the seriousness of an offense is the severity of the maximum authorized penalty fixed by the legislature. Under this approach, when an offense carries a maximum prison term of 6 months or less,...., it is presumed to be petty unless the defendant can show that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is a serious one."

The additional statutory penalties that are authorized by the Arizona State legislature are of credence relative to the United States Supreme Court. In Blanton, it was judged that an offense is determined to be serious based on severity of maximum authorized penalty fixed by the legislature.

The Arizona State legislature, by involving the non-violent offense of interfering with judicial procedures with the violent offense of domestic violence, has created a chain reaction of events that results in one of the severest of penalties, the possibility of a parent losing custody of their children.

The following is a statutory roadmap of the process beginning with the non-violent violation of an order of protection to the eventual loss of custody of a parent's children.

Starting with ARS 13-3601(A), the definition and classification of offenses included in domestic violence is revealed: " 'Domestic violence' means any act which is ... an offense defined in section 13-1201 through ..., section 13-2810, ..." Thus, interfering with judicial procedures, a violation of ARS 13-2810, is included as an act of domestic violence via ARS 13-3601 (A), aforementioned.

There has been argument from various sources, including the Arizona Court of Appeals as to whether or not ARS 13-3601 creates a separate offense of domestic violence or if the statute is only procedural in nature. "A.R.S. § 13-3601 is a procedural statute; it does not create a separate offense of domestic violence." State v. Schackart, 153 Ariz. 422, 423, 737 P.2d 398, 399.

This argument is nonsensical since the creation of the offense is not the issue. The issue, as always opined by the high courts, is that it is the inclusion of the possible maximum penalty of the offense that is of concern. Again referring to Blanton: "In using the word 'penalty,' we do not refer solely to the maximum prison term authorized for a particular offense. A legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense."

However, if the existence of the offense is paramount, then under ARS 13-3601.01(F), the creation of the offense is clearly detailed. "For the purposes of this section, 'domestic violence offense' means an offense involving domestic violence as defined in section 13-3601."

Since ARS 13-3601involves ARS 13-2810 (interfering with judicial proceedings) and by the definition set forth in ARS 13-3601.01, there can be no logical argument against the notion as to whether the offense was actually created. The petitioner argues further that a penalty for an offense can not exist if there was no offense originally. Moreover, per ARS 13-3601 (M), the statutory penalties of the offense are outlined: "If the defendant is found guilty of an offense included in domestic violence ... the court may...place the defendant on probation or intensive probation, ...and additional conditions and requirements which the court deems appropriate, including imposition of a fine, incarceration of the defendant ..."

These additional penalties may be probation, a fine or an unspecified time of incarceration, which may be greater than 6 months, since this determination is at the discretion of the court. The cost to the defendant of these legislatively included penalties, which must be borne by the defendant, can be in excess of $5000. It should be apparent that the legislature's view of this offense, is a serious one. Therefore, it is necessary to include all of these possible penalties, included by legislation, when determining jury eligibility on the basis of the severity of the penalty.

In addition to all of the possible additional fines or terms of incarceration included by legislation is the severest of penalties as pertaining to the possible loss of child custody.

ARS 25-403 states:

> "The court shall consider evidence of domestic violence as being contrary to the best interests of the child. ....The person who has committed an act of domestic violence has the burden of proving that visitation will not endanger the child or significantly impair the child's emotional development."
>
> "Notwithstanding subsection N of this section, joint custody shall not be awarded if the court makes a finding of the existence of significant domestic violence pursuant to section 13-3601 or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence."

Under ARS 25-403, the defendant could lose all custody and visitation of his children. The loss of a parent's relationship with his children is indeed a severe penalty.

Also, under ARS 25-403, the "violating" parent is burdened by the legislation to prove that they should enjoy the privilege of visitation and that the visitation will not endanger the child. This level of proof requires a court ordered specialist to evaluate the parent and the children for a period of 9 to 12 months at a typical cost of up to $5,000. This financial penalty that is indirectly included by the legislature is even greater than that of the maximum fine possible of the original offense of "interfering with judicial proceedings" under ARS 13-2810.

These ancillary penalties are hard to imagine as fair and just for someone who has never been charged or convicted of domestic violence. The action of the legislature of "including" domestic violence with another offense and also including the penalty of the offense is in the opinion of the petitioner, an absolute disregard of a citizen's due process rights.

The petitioner will now argue that the offense of interfering with judicial procedures, when involved with domestic violence, results in a crime of moral turpitude.

The Petitioner believes that being branded (albeit a false accusation which makes the labeling even more severe) as a "wife batterer" is indeed a crime viewed by society as one of moral turpitude. How could any member of our present day society condone the physical abuse of a spouse, especially a female spouse without vileness and depravity?

Crimes involving moral turpitude (from Benitez) are necessarily jury eligible because the "damage to reputation, humiliation and loss of dignity beyond that associated with all crimes bring moral turpitude...into the realm of serious cases."

It cannot be ignored that the courts, as well as society in general, view domestic violence as a crime of moral turpitude. Proof of this is written in our court history.

Per the United States Court of Appeals (1st Circuit Herrera-Inirio v. INS - 208 F.3d 304 (2000)

> "A federal statute, 8 U.S.C. § 1227(a)(2)(E)(i), provides that an alien who is convicted of a crime of domestic violence at any time after his entry into the United States is subject to deportation. A companion statute, 8 U.S.C. § 1227(a)(2)(A)(i), provides that an alien who, having acquired lawful permanent resident status, is convicted within ten years after admission to the United States of a crime of moral turpitude (for which a sentence of one year or longer may be imposed) is likewise subject to deportation."

If domestic violence, as well as a crime of moral turpitude, can be used as grounds for deportation, then domestic violence must be an offense equally weighted with moral turpitude. Therefore, domestic violence is a crime that is as severe as a crime of moral turpitude and thus must be considered as jury eligible.

In addition, per the United States Court of Appeals (9th Circuit Grageda v. INS - 12 F.3d 919 (1993)

"We must decide whether spousal abuse is a crime of moral turpitude upon the basis of which an alien can be deported."

> "Although California Penal Code 273.5(a) does not define its crime so vividly, the reasoning of Guerrero do Nodahl suggests that then a person willfully beats his or her spouse severely enough to cause 'a traumatic condition,' he or she has committed an act of baseness or depravity contrary to accepted moral standards."
>
> "Because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements, we hold that spousal abuse under section 273.5(a) is a crime of moral turpitude."
>
> "Because Grageda's conviction was final, the IJ did not abuse his discretion in denying Grageda's request for a continuance. Because willful injury of one's spouse under California Penal Code section 273.5(a) is a crime of moral turpitude, we affirm Grageda's deportation order."

The aforementioned U.S. 9th Circuit Court of Appeals decision unambiguously includes spousal abuse as a crime of moral turpitude.

In conclusion, because the legislature of the State of Arizona has defined, and intended to define, an offense that results in any penalty other than a fine, as "not petty", the right to a trial by jury can not be ignored.

The legislature of the State of Arizona has included the singular non-violent offense of "interfering with judicial proceedings" with the more serious crime of domestic violence. The inclusion of the violent offense results in serious penalties, including the possible loss of a parent's children. Thus, the right to a trial by jury can not be ignored.

The federal courts view domestic violence as an act of moral turpitude. Therefore, the right to a trial by jury can not be ignored.

The petitioner states again that he is not guilty of domestic violence. The petitioner was charged and prosecuted only for the singular offense of "interfering with judicial proceedings". However, the original offense has been included in the offense of domestic violence and thusly the petitioner is not only under the threat of penalties intended for the original non-violent offense, but in addition, all of the direct and indirect penalties involved with the offense of domestic violence.

Moreover, the United States Supreme Court in Duncan v. Louisiana, (391 U.S. 145 -1968) stated perspicaciously in part:

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. 23 [391 U.S. 145, 156]. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority."

Argument 5: Bills of Attainder

The petitioner was originally charged with the singular offense of "interfering with judicial proceedings". The offense of "interfering with judicial proceedings", ARS 13-2810, as stated earlier in this memorandum, is punishable under ARS 13-707 and ARS 13-802 by a maximum of 6 months imprisonment and a $2500 fine. However, the lower court upon adjudication of guilt upon the defendant, petitioner herein, has included additional penalties related to domestic violence with the original offense.

Again, per ARS 13-3601 (M), the statutory penalties of the offense are outlined:

> "If the defendant is found guilty of an offense included in domestic violence ... the court may...place the defendant on probation or intensive probation, ...and additional conditions and requirements which the court deems appropriate, including imposition of a fine, incarceration of the defendant ..."

The Petitioner declares that he is being legislatively punished without due process or trial. The inclusion of these additional penalties, are without due process and prohibited by Article I Section 9 of the United States Constitution and Article 2 Section 25 the Arizona State Constitution .

The prohibition of bills of attainder was intended to implement the separation of powers among the three branches of the government by guarding against the legislative exercise of judicial power. The inclusion of domestic violence penalties by legislative statute, with the non-violent offense of "interfering with judicial proceedings" penalties is unconstitutional.

The U. S. Supreme Court in United States v. Brown, 381 U.S. 437 (1965)

> "While history thus provides some guidelines, the wide variation in form, purpose and effect of ante-Constitution bills of attainder indicates that the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply - trial by legislature."

In short, the Arizona legislature, by involving penalties intended for violent crimes with non-violent crimes have denied the petitioner due process under law.

The petitioner questions how an individual can "automatically" be labeled as a perpetrator of a violent crime and subsequently punished for an offense that he was never charged with or guilty of. These practices in Arizona are with an absolute disregard to due process of law.

The petitioner urges the United States Supreme Court to review, pursuant to 18 USC Sec. 2403 (b), the constitutionality of Arizona law, specifically ARS 13-3601.

These unconstitutional practices by the State of Arizona are penalizing non-violent citizens with penalties intended for violent offenses and should not be allowed to continue.

Conclusion

The rights of the accused in criminal prosecutions are clearly defined by the United States Constitution and the Arizona State Constitution.

Amendment VI of the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article 2 Section 24 of the Arizona Constitution states:

> In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Prayer for Relief

The petitioner prays that the Supreme Court will provide the following relief to the Petitioner.

1. Dismiss the prosecution against the petitioner due to the State of Arizona failing to provide the petitioner a speedy trial.
2. Dismiss the prosecution against the petitioner due to the State of Arizona failing to recognize a defense of necessity.
3. Dismiss the prosecution against the petitioner due to the State of Arizona failing to prove criminal intent.

If the Supreme Court of the United States will not provide the aforementioned relief, the petitioner prays further for the following relief.

4. Vacate the lower court's decision and grant the petitioner his constitutional right to a trial by jury.

If the Supreme Court of the United States will not provide the aforementioned relief, the petitioner prays further for the following relief.

5. Modify the imposed sentence against the petitioner to remove any penalty or inference to any penalty involved in the crime of domestic violence.

   Furthermore, to declare unconstitutional ARS 13-3601, pursuant to Title 18 USC, Section 2403 (b), the legislative involvement of a non-violent offense with that of a violent offense.

Appendix

Opinions of the Arizona Courts

The Maricopa County Superior Court (Case No. LC 2000-002169) reviewed this case on appeal and affirmed the decision of the East Mesa Justice Court (Case No. CR00-1448MI) May 16, 2001. The Honorable Frank T. Galati addressed the issues in summary fashion on May 10, 2001, as follows:

1. " Defendant's Rule 8 right to a speedy trial was not violated because he was tried within the time limits of Rule 8.2(a)."
2. " Defendant waived his right to counsel and his subsequent attempt to have the court appoint counsel for him was not supported by any credible evidence of his indigency. In order to have counsel appointed at public expense, it is the burden to prove that he is indigent. Defendant failed to do so, therefore, there was no error committed."
3. " The trial court properly ruled that the condition of the premises was not relevant to any of the issues properly before the court. The "defense of necessity" was not applicable to this case, either legally or factually."
4. "Defendant appears to challenge the sufficiency of the evidence of the requisite culpable mental state. For 13-2810, that culpable state is "knowingly." The evidence is more than sufficient."
5. " Applying the three prong test of Benitez v. Dunevant , 198 Ariz. 90, 7P. 3d. 99 (2000), the trial court did not abuse its discretion in denying defendant's request for a jury trial. Interfering with judicial proceedings is not a crime of moral turpitude and is a misdemeanor."
6. " The terms and conditions of probation imposed are all legally permissible and well within the sound discretion of the sentencing court."

Orders of the Arizona Courts

Per the Arizona Supreme Court Clerk: (Sept 20, 2001)
(Re: Motion for Reconsideration)

" This case is now closed at the Arizona Supreme Court."

Per the Arizona Supreme Court: (Sept 13, 2001)

" ORDERED: Appellant's Notice of Appeal [Petition for Review] = DENIED."

Per the Arizona Court of Appeals: (June 4, 2001)

" IT IS ORDERED dismissing this appeal."

Per the Maricopa County Superior Court: (May 10,2001)

" IT IS ORDERED affirming the judgement and sentence of the East Mesa Justice Court and IT IS FURTHER ORDERED remanding this case to that court for execution of sentence."

Per the East Mesa Justice Court: (Oct 16, 2000)
(Re: Petitioner's motion to vacate Bench Trial, Set Jury trial & motion to dismiss for Reasons of Necessity.)

"It is therefore ordered denying both motion(s)."
"It is further ordered that Bench Trial remain set for November 9, 2000 at 2:30pm."

Judgement to be Reviewed

(Per Judge Johnson - East Mesa Justice Court - Nov 9, 2000)

"So the court will order domestic violence [counseling] as we are required by statute in this event .... "

"The court is going to impose 100 hours of community service to be performed by the 10th of February, 2001... and a fine of $314 to be paid in payment if not... able to paid in full today."

Section 1 – Speedy Trial

Constitutional Table of Contents - Appendix

United States Constitution -Amendment VI

"**In all criminal prosecutions**, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation..."

Arizona State Constitution - Article 2 Section 11

"Justice in all cases shall be administered openly, and without unnecessary delay. "

Statutory Table of Contents - Appendix

United States Code - 18 USC § 3161(c)(1)

"In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent."

Arizona Revised Statutes 13-114 - Speedy trial

In a criminal action defendant is entitled:

1. To have a **speedy** public trial by an impartial jury of the county in which the offense is alleged to have been committed.

Case History

Barker v. Wingo, 407 U.S. 514 (1972)

"Perhaps because the speedy trial right is so slippery, two rigid approaches are urged upon us as ways of eliminating some of the uncertainty which courts experience in protecting the right. The first suggestion is that we hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period. The result of such a ruling would have the virtue of clarifying when the right is infringed and of simplifying courts' application of it. Recognizing this, some legislatures have enacted laws, and some courts have adopted procedural rules which more narrowly define the right. "

"We regard none of the four factors identified above [length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant] as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution."

Section 2 – Necessity Defense

Constitutional

No Constitutional References are known at this time.

Statutory

Arizona Revised Statutes 13-417 (A) - Necessity defense

"Conduct that would otherwise constitute an offense is justified if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person's own conduct."

Arizona Revised Statutes 13-2908 (A) - Criminal nuisance

A person commits criminal nuisance:

1. "If, by conduct either unlawful in itself or unreasonable under the circumstances, such person recklessly creates or maintains a condition which endangers the safety or health of others."

Case History

United States v. Bailey 444 U.S. 394 (1980)

"In the present case, we must examine both the mental element, or mens rea, required for conviction.... and the circumstances under which the "evil-doing hand" can avoid liability under that section because coercive conditions or necessity negates a conclusion of guilt even though the necessary mens rea was present."

Case History

Barker v. Wingo, 407 U.S. 514 (1972)

"Perhaps because the speedy trial right is so slippery, two rigid approaches are urged upon us as ways of eliminating some of the uncertainty which courts experience in protecting the right. The first suggestion is that we hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period. The result of such a ruling would have the virtue of clarifying when the right is infringed and of simplifying courts' application of it. Recognizing this, some legislatures have enacted laws, and some courts have adopted procedural rules which more narrowly define the right. "

"A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

"We regard none of the four factors identified above [length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant] as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution."

Section 3 – Criminal Intent

Constitutional

No Constitutional References are known.

Statutory

No Statutory References are known.

Case History

Morissette v. United States, 342 U.S. 246 (1952)

"It is fundamental that a person is not criminally responsible unless **criminal intent** accompanies the wrongful act." (stating that a crime is the "concurrence of an evil-meaning mind with an evil-doing hand").

United States v. Bailey 444 U.S. 394 (1980)

"Sometimes `general intent' is used in the same way as `criminal intent' to mean the general notion of mens rea, while `specific intent' is taken to mean the mental state required for a particular crime. Or, `general intent' may be used to encompass all forms of the mental state requirement, while `specific intent' is limited to the one mental state of intent."

Section 4 – Jury Trial

Constitutional

United States Constitution - Article III Section 2

"The trial of all crimes, except in cases of impeachment, **shall** be by jury;..."

United States Constitution - Amendment VI

"In all criminal prosecutions, the accused **shall** enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation..."

Arizona State Constitution - Article 2 Section 24

"In criminal prosecutions, the accused **shall** have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed."

Arizona State Constitution - Article 2 Section 23

" The right of trial by jury **shall remain inviolate.** Juries in criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law shall consist of twelve persons. In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict. In all other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law."

Statutory

United States Code - 8 U.S.C. § 1227(a)(2)(E) (i) & (ii)

(a) Classes of deportable aliens

(2) Criminal offenses

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable.

United States Code - 8 U.S.C. § 1227(a)(2)(A)(i)

(a) Classes of deportable aliens
(2) Criminal offenses
(A) General crimes
(i) Crimes of moral turpitude Any alien who -

"is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) "

Arizona Revised Statutes - 13-105.

Definitions

In this title, unless the context otherwise requires:

9. "Culpable mental state" means intentionally, knowingly, recklessly or with criminal negligence as those terms are thusly defined:

(a) "Intentionally" or "with the intent to" means, with respect to a result or to conduct described by a statute defining an offense, that a person's objective is to cause that result or to engage in that conduct.

(b) "Knowingly" means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that his or her conduct is of that nature or that the circumstance exists. It does not require any knowledge of the unlawfulness of the act or omission.

(c) "Recklessly" means, with respect to a result or to a circumstance described by a statute defining an offense, that a

person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard of such risk constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware of such risk solely by reason of voluntary intoxication also acts recklessly with respect to such risk.

(d) "Criminal negligence" means, with respect to a result or to a circumstance described by a statute defining an offense, that a person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

27. **"Petty offense" means an offense for which a sentence of a fine only is authorized by law.**

Arizona Revised Statutes 13-2810

Interfering with judicial proceedings; classification

A. A person commits interfering with judicial proceedings if such person knowingly:

1. Engages in disorderly, disrespectful or insolent behavior during the session of a court which directly tends to interrupt its proceedings or impairs the respect due to its authority; or

2. Disobeys or resists the lawful order, process or other mandate of a court; or…

B. Interfering with judicial proceedings is a class 1 misdemeanor.

Arizona Revised Statutes - 13-3601

Domestic violence; definition; classification; sentencing option; arrest and procedure for violation; weapon seizure; notice; report; diversion

A. "Domestic violence" means any act which is a dangerous crime against children as defined in section 13-604.01 or an offense defined in section 13-1201 through 13-1204, 13-1302 through 13-1304, 13-1502 through 13-1504 or 13-1602, section 13-2810, section 13-2904, subsection A, paragraph 1, 2, 3 or 6, section 13-2916 or section 13-2921, 13-2921.01, 13-2923, 13-3019, 13-3601.02 or 13-3623, if any of the following applies:

L. An offense included in domestic violence carries the classification prescribed in the section of this title in which the offense is classified. If the defendant committed a felony offense listed in subsection A of this section against a pregnant victim and knew that the victim was pregnant or if the defendant committed a felony offense causing physical injury to a pregnant victim and knew that the victim was pregnant, the maximum sentence otherwise authorized shall be increased by up to two years.

M. If the defendant is found guilty of an offense included in domestic violence and if probation is otherwise available for that offense, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation or intensive probation, as provided in this subsection. The terms and conditions of probation or intensive probation shall include those necessary to provide for the protection of the alleged victim and other specifically designated persons and additional conditions and requirements which the court deems appropriate, including imposition of a fine, incarceration of the defendant in a county jail, payment of restitution, completion of a domestic violence offender treatment program that is provided by a facility approved by the department of health services or a probation department or any other

counseling or diversionary programs that do not involve domestic violence and that are available to the defendant. On violation of a term or condition of probation or intensive probation, the court may enter an adjudication of guilt and proceed as otherwise provided for revocation of probation. On fulfillment of the terms and conditions of probation or intensive probation, the court shall discharge the defendant and dismiss the proceedings against the defendant. This subsection does not apply in any case in which the defendant has previously been found guilty under this section, or in which charges under this section have previously been dismissed in accordance with this subsection.

O. If the defendant is found guilty of a first offense included in domestic violence, the court shall provide the following written notice to the defendant:

You have been convicted of an offense included in domestic violence. You are now on notice that:

1. If you are convicted of a second offense included in domestic violence, you may be placed on supervised probation and may be incarcerated as a condition of probation.

2. A third or subsequent charge may be filed as a felony and a conviction for that offense shall result in a term of incarceration

Arizona Revised Statutes - 13-3602

Order of protection; procedure; contents; arrest for violation; penalty; protection order from another jurisdiction
J. The order shall include the following statement:

Warning
This is an official court order. If you disobey this order, you may be arrested and prosecuted for the crime of interfering with judicial proceedings and any other crime you may have committed in disobeying this order.

M. A peace officer may, with or without a warrant, arrest a person if the peace officer has probable cause to believe that the person has violated section 13-2810 by disobeying or resisting an order issued in any jurisdiction in this state pursuant to this section, whether or not such violation occurred in the presence of the officer. Criminal violations of an order issued pursuant to this section shall be referred to an appropriate law enforcement agency. The law enforcement agency shall request that a prosecutorial agency file the appropriate charges. A violation of an order of protection shall not be adjudicated by a municipal or justice court unless a complaint has been filed or other legal process has been requested by the prosecuting agency. The provisions for release under section 13-3883, subsection A, paragraph 4 and section 13-3903 do not apply to an arrest made pursuant to this section. For purposes of this section, any court in this state has jurisdiction to enforce a valid order of protection that is issued in this state and that has been violated in any jurisdiction in this state.

Arizona Revised Statutes 22-320 (A) - Jury Trial.

"A trial by jury shall be had if demanded by either the state or defendant. Unless the demand is made at least five days before commencement of the trial, a trial by jury shall be deemed waived."

Arizona Revised Statutes - 25-403 - Custody

Custody; drug offenses; best interests of child; joint custody; domestic violence; modification of decree; fees

E. Notwithstanding subsection N of this section, joint custody shall not be awarded if the court makes a finding of the existence of significant domestic violence pursuant to section 13-3601 or if the court finds by a preponderance of the evidence that there has been a significant history of domestic violence.

Case History

Blanton v. North Las Vegas, 489 U.S. 538 (1989)

"The most relevant criterion for determining the seriousness of an offense is the severity of the maximum authorized penalty fixed by the legislature. Under this approach, when an offense carries a maximum prison term of 6 months or less,...., it is presumed to be petty unless the defendant can show that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense is a serious one."

"In using the word "penalty," we do not refer solely to the maximum prison term authorized for a particular offense. A legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense."

"Although we did not hold in Baldwin that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense, and decline to do so today, we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as 'petty.' A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one." "This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems "serious" with onerous penalties that nonetheless do not puncture the 6-month incarceration line."

Duncan v. Louisiana, 391 U.S. 145 (1968)

"The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States. "

Arizona Supreme Court

Benitez v. Dunevant 198 Ariz. 90 (2000)
CV 98-05 40-PR (July 2000)

Discussion

The Rothweiler/Dolny Test

"The test for jury eligibility in this state requires an inquiry into the seriousness of the offense. "Serious" offenses have been found jury eligible while "petty" offenses have been found ineligible. See, e.g., Dolny, 161 Ariz. at 299, 778 P.2d at 1195. This dichotomy is rooted in the Arizona Constitution. Article II, sections 23 and 24, guarantee jury rights to all criminal defendants, stating respectively, "the right of trial by jury shall remain inviolate" and "in criminal prosecutions, the accused shall have the right . . to have a speedy public trial by an impartial jury . . . ." Ariz. Const. art. II, §§ 23-24. The constitutional guarantee of trial by jury is not a *grant*, but a *reservation* of a pre-statehood right. See, e.g., United States Fidelity & Guar. Co. v. State, 65 Ariz. 212, 217, 177 P.2d 823, 826 (1947); In re Davis, 28 Ariz. 312, 313, 236 P. 715, 716 (1925). Thus, those offenses linked to jury trial at common law at the time the constitution was adopted are protected by the constitutional guarantee. It is because petty offenses were not triable to a jury at common law that we continue to distinguish between petty and serious offenses in the determination of jury eligibility."

"In pre-Rothweiler jury eligibility cases, we focused primarily on the common law right, rather than on the "seriousness"of the offense. See State v. Cousins, 97 Ariz. 105, 107-08, 397 P.2d 217, 218 (1964); Davis, 28 Ariz. at 313, 236 P. at 716; Bowden v. Nugent, 26 Ariz. 485, 486-87, 226 P. 549, 549-50 (1924). But in Rothweiler, recognizing that some offenses, non-

existent at common law, are nonetheless comparable in both severity and consequence to jury eligible crimes, we formulated a three-part test to establish a more flexible inquiry into the question of eligibility. 100 Ariz. at 42, 410 P.2d at 483. The test determines which offenses approximate the penalties, the consequences, and the stigmas that would have secured a jury right at common law. We have used the term "petty" to refer to non-eligible crimes. The term may cause confusion, however, due to the inconsistency between judicial use of the term and the legislative classification of offenses as "petty," "misdemeanor," or "felony." See A.R.S. §§ 13-105 (Supp. 1999), -701 (Supp. 1999), -707, and -803 (1989). Although we accord deference to legislative designations in determining the seriousness of an offense, see, e.g., Dolny, 161 Ariz. at 299-300, 778 P.2d at 1195-96, the courts alone are vested with constitutional authority to determine jury eligibility."

"Thus, we do not attach a jury right to a felony, merely because the legislature has classified it as such, but rather, because, applying our own test, the right attaches to an offense that is sufficiently serious or would have been protected at common law. Similarly, we do not decline to find jury eligibility for a misdemeanor simply because it has been legislatively classified a misdemeanor. Rather, we look to the consequences of a conviction including the penalties and their impact, as well as the public condemnation of the act, to determine whether any given offense warrants a constitutionally protected jury right."

"The three factors formulated in Rothweiler to determine jury eligibility are: (a) the relationship of the offense to common law crimes; (b) the severity of the potential penalties made available by statute; and (c) the moral quality of the offense. See Rothweiler, 100 Ariz. at 47, 410 P.2d at 486."

"The application of these factors does not follow a set formula. However, we held in State ex rel. McDougall v. Strohson that the second factor, the severity of the maximum potential penalty authorized by the statute, is the most significant. 190 Ariz.

120, 124, 945 P.2d 1251, 1255 (1997); see also Bruce v. State, 126 Ariz. 271, 272-73, 614 P.2d 813, 814-15 (1980). As such, once that factor is established, the right to trial by jury is conclusive.

"Moreover, if an offense is traceable to jury eligibility at common law, then the jury right is also firmly established even in the absence of the other two factors. The final factor -- moral quality -- is more flexible and thus requires careful analysis in its application. However, even in the absence of the other factors, a jury right is present for crimes involving moral turpitude or for crimes with potential for such grave consequences that they are considered serious in the eyes of society.

"Acts of "moral turpitude" constitute behavior which is "depraved and inherently base," O'Neill, 103 Ariz. at 485, 445 P.2d at 844, or actions which "adversely reflect on one's honesty, integrity, or personal values." Dolny, 161 Ariz. at 300 n.3, 778 P.2d at 1196 n.3. Crimes of moral turpitude are necessarily jury eligible because the "damage to reputation, humiliation, and loss of dignity beyond that associated with all crimes brings moral turpitude crimes . . . into the realm of serious cases."

Rothweiler v. Superior Court 410 P2d 479 (1966).

"We have in other decisions discussed the extent of right of trial by jury as guaranteed by the Arizona Constitution. In Brown v. Greer, 16 Ariz. 215, 141 P. 841 (1914), we stated that the right of a jury trial as declared by our Constitution applied to such right as "existed when the Constitution was adopted." "

"Therefore, because the offense of driving while intoxicated is a serious offense not comparable to common law petty offenses today, and because by reasonable, practical construction of the state statutes relating to trial by jury in courts not of record, we hold that the petitioner is entitled to a trial by jury in the city court and since the matter must be tried de novo on

appeal, is entitled to a jury trial in the Superior Court. Vazzano v. Superior Court, 74 Ariz. 369, 249 P.2d 837 (1952)."

"Fundamental rights should not depend upon an arbitrary choice as to the court in which they are instituted. There must be uniformity of treatment in criminal prosecutions, not depending on the place of prosecution, and this includes the right of trial by jury. The right to a jury trial should be jealously guarded and preserved by the courts, whether granted by the constitution or statutes. We are convinced that this right extends to the petitioner under the offense charged."

Dean v. Dolny, 778 P.2d 1193, 161 Ariz. 297 (1989)

The three prongs of the Rothweiler test are: (1) the severity of the possible penalty; (2) the moral quality of the crime; and (3) the relationship of the crime to common law crimes. The court of appeals concluded that the defendants did not qualify for a jury trial under Rothweiler.

"Our legislature has defined "petty offense" as "an offense for which a sentence of a fine only is authorized by law." A.R.S. § 13-105(24). We agree with the observations of Judge Contreras, dissenting in State v. Moreno, 134 Ariz. 199, 655 P.2d 23 (App.1982), that, while the statutory definition of "petty" is not controlling on the issue of right to jury trial, it is entitled to considerable deference, particularly given the fact that our legislature has defined the terms "felony," "misdemeanor," and "petty" in a mutually exclusive manner. See A.R.S. § 13-105(13, 18 and 24). We find it significant that the legislature does not consider any offense "petty" which could result in any jail time, let alone six months."

"Certainly, being charged with a crime of moral turpitude warrants a jury trial. Damage to reputation, humiliation, and loss of dignity beyond that associated with all crimes brings moral

turpitude crimes, by their very nature, into the realm of serious cases. However, being tried for a crime that does not fall within the definition of moral turpitude may also be serious enough to warrant a jury trial, chiefly because of the grave consequences resulting from conviction. Thus, we regard it as a mistake to read Rothweiler to hold that the moral quality prong only applies to moral turpitude crimes."

"We hold that under Rothweiler a misdemeanor charge of possession of marijuana is sufficiently serious to warrant a jury trial, primarily because of the potentially grave consequences, together with the potential direct punishment, resulting from a conviction. The court of appeals opinion is vacated. The superior court judgments are affirmed. The cases are remanded for jury trials."

McDougall v. Strohson, 945 P.2d 1251, 190 Ariz. 120 (1997)

"As previously discussed, however, Arizona courts also have looked at whether the crime involves moral turpitude, the relationship of the crime to common law crimes, and to the additional serious or grave consequences that might flow from a conviction. In making these determinations, we have never looked to the law of other jurisdictions and the collateral consequences that might be imposed by the other jurisdictions."

"We have already said in Dolny that the classification accorded to a crime by the legislature is entitled to great weight in determining jury entitlement, although it is not controlling. Dolny, 161 Ariz. at 299-300, 778 P.2d at 1195-96. Much as the special concurrence would defer to a legislative preference, if one were expressed, the simple fact is that questions of jury entitlement involve constitutional considerations; so judicial abandonment to a legislative preference (again, assuming a legislative preference had been expressed) is not permissible since, clearly, the court is the final arbiter of whether a legislative act passes constitutional

muster. See, e.g., Roosevelt Elem. Sch. Dist. v. Bishop, 179 Ariz. 233, 877 P.2d 806 (1994)."

"Indeed, the most relevant statute, A.R.S. § 13-105 (27), would indicate that the legislature would go farther than we have gone in granting jury trials because it evinces a legislative intent that no offense carrying any potential imprisonment may be considered "petty."

Herrera-Inirio v. INS - 208 F.3d 304 - 1st Cir (2000)

"A federal statute, 8 U.S.C. § 1227(a)(2)(E) (i) , provides that an alien who is convicted of a crime of domestic violence at any time after his entry into the United States is subject to deportation. A companion statute, 8 U.S.C. § 1227(a)(2)(A)(i), provides that an alien who, having acquired lawful permanent resident status, is convicted within ten years after admission to the United States of a crime of moral turpitude (for which a sentence of one year or longer may be imposed) is likewise subject to deportation. On July 24, 1998, the Immigration and Naturalization Service (the INS) invoked these statutes and instituted removal proceedings against the petitioner."

"At his deportation hearing, the petitioner argued that he had merely been placed in a pretrial diversion program and thus had neither been "convicted" of the offense of spousal abuse nor "sentenced" to one year of probation. On January 15, 1999, the immigration judge (the IJ) ruled that the petitioner had been convicted of the crime for immigration purposes; that the crime was potentially punishable by a prison term of one year and involved moral turpitude; and that the petitioner had been sentenced to probation. Consequently, she ordered the petitioner removed from the United States."

Grageda v. INS - 12 F.3d 919 - 9th Cir (1993)

"We must decide whether spousal abuse is a crime of moral turpitude upon the basis of which an alien can be deported."

"The statute at issue here provides that: 'Any person who willfully inflicts upon his or her spouse, . . . corporal injury resulting in a traumatic condition, is guilty of a felony. . . .' Cal. Penal Code 273.5(a). 1 In Guerroro de Nodahl, the court had to determine the intrinsic nature of a similar crime - child abuse. There, the court held that California Penal Code 273d, making it a felony to 'willfully inflict upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition,' defined a crime of moral turpitude. 407 F.2d at 1406 -07, It concluded that such harm was contrary to American ethics, and that the fact it was done willfully 'ended debate on whether moral turpitude was involved."

"Although California Penal Code 273.5(a) does not define its crime so vividly, the reasoning of Guerrero do Nodahl suggests that then a person willfully beats his or her spouse severely enough to cause 'a traumatic condition,' he or she has committed an act of baseness or depravity contrary to accepted moral standards."

"Because **spousal abuse** is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements, we hold that spousal abuse under section 273.5(a) **is a crime of moral turpitude."**

"Because Grageda's conviction was final, the IJ did not abuse his discretion in denying Grageda's request for a continuance. Because willful injury of one's spouse under California Penal Code section 273.5(a) is a crime of moral turpitude, we affirm Grageda's deportation order."

Section 5 – Bill of Attainder

Constitutional Table of Contents - Appendix

United States Constitution - Article I Section 9

"No bill of attainder or ex post facto Law shall be passed."

United States Constitution -Amendment XIV - Section 1 provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, **without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

Arizona State Constitution - Article 2 Section 25

"No bill of attainder, ex-post-facto law, or law impairing the obligation of a contract, **shall ever** be enacted."

Statutory

18 U.S.C. § 16 - Crime of violence defined

The term "crime of violence" means –

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

Case History

United States v. Brown, 381 U.S. 437 (1965)

"While history thus provides some guidelines, the wide variation in form, purpose and effect of ante-Constitution bills of attainder indicates that the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, **or more simply - trial by legislature."**

Certificate of Compliance

The petitioner hereby certifies that the booklet format of this petition complies with United States Supreme Court Rules as adopted January 11, 1999 as follows:

Pursuant to Rule 13, this petition is timely.

Pursuant to Rule 14, this petition conforms to the content requirements.

Pursuant to Rule 33, this petition conforms to the form requirements.

Acknowledgment

On this 14 day of DEC, 2001 in the State of Arizona, County of Maricopa,

I BARBARA J. DUDECK, a Notary Public, hereby acknowledge that the petitioner in and who affirmed this memorandum are of one and the same.

My commission expires:
Aug 10, 2003

Barbara J Dudeck

BARBARA J. DUDECK
Notary Public - Arizona
Maricopa County
My Commission Expires
Aug 10, 2003

Notary Public

RESPECTFULLY SUBMITTED this 14 day of DEC, 2001.

Petitioner/Appellant Pro Per Steven Bandusky

Steven J. Bandusky

PO Box 20671
Mesa, AZ. 85277
480-891-5270

Certificate of Service

The petitioner hereby certifies that on this 14th day of DECEMBER, 2001, the original of the foregoing and true and correct copies of the same were delivered/mailed to the following parties: Service by: Steven J. Bandusky

Steven J. Bandusky

Original and 40 copies of the foregoing have been mailed or delivered to the following party:

Clerk of the Court
Supreme Court of the United states
1 First street, N.E.
Washington, DC 20543

Copies of the foregoing have been mailed or delivered to the following parties:

Clerk of the Supreme Court
402 Arizona Courts Bldg.
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Phoenix, Arizona 85007

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